ARKANSAS SUPREME COURT

No. CR 05-141

NOT DESIGNATED FOR PUBLICATION	**Opinion Delivered** **October 5, 2006**
PHILIP EUGENE PARMLEY Appellant	*PRO SE* APPEAL FROM THE CIRCUIT COURT OF GARLAND COUNTY, CR 2001-529, HON. JOHN HOMER WRIGHT, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED

PER CURIAM

A jury found appellant Philip Eugene Parmley guilty of possession of a controlled substance and sentenced him to 360 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Parmley v. State*, CACR 03-71 (Ark. App. January 14, 2004). Appellant filed in the trial court a *pro se* petition for postconviction relief under Ark. R. Crim. P. 37.1. Appellant's initial petition was considerably longer than the ten pages permitted under Rule 37.1, and although there is no order in the record which so reflects, it appears that the trial court permitted appellant to amend his petition. While the new petition was still somewhat over ten pages, the trial court entered an order permitting the overlength petition, and, in a later order, the petition was denied without an evidentiary hearing. Appellant now brings this *pro se* appeal of the order denying postconviction relief.

In its order, the trial court indicated that appellant's petition raised four grounds alleging ineffective assistance of counsel, in that counsel failed to seek a suppression hearing, that there was

a failure by the State to prove a statement by appellant was voluntary, that counsel failed to prevent admission of uncharged offenses, and that counsel did not object to unqualified expert opinion from a crime lab technician. The court held that none of the grounds so alleged provided for relief under a Rule 37.1 petition.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant asserts that the trial court erred by finding trial counsel was not ineffective and by failing to hold an evidentiary hearing. In his brief to this court, appellant argues that counsel was ineffective for failing to seek a suppression hearing. In his argument on that point, appellant raises issues concerning the admission of the methamphetamine, in addition to issues concerning suppression of a statement that appellant made at the time the methamphetamine was found and which identified the substance. Appellant also argues trial counsel was ineffective for failure to object to the introduction of certain charges and failure to challenge an expert's conclusions at trial.

The State contends that appellant did not raise the issue of a suppression hearing as to the admission of the methamphetamine below, and that, even if appellant's petition were liberally construed to include such an issue, appellant failed to obtain a ruling on that issue. We agree that the trial court's order contains no ruling upon the issue. Failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal, and we must therefore

decline to address such an issue. *Howard v. State*, ___ Ark. ___, ___ S.W.3d ___ (June 29, 2006).

Appellant's remaining issues allege ineffective assistance of counsel. In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Under the criteria for assessing the effectiveness of counsel as set out in *Strickland*, when a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, *i.e.*, that the decision reached would have been different absent the errors. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene*, 356 Ark. at 64, 146 S.W.3d at 876.

Because a petitioner claiming ineffective assistance of counsel must show prejudice, where he asserts error for failure to raise an argument, he must make a showing that the argument would have been successful, in order to rebut the presumption that counsel's conduct was reasonable and

show that the argument, if made, would have been sufficient to undermine confidence in the outcome of the trial. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene*, 356 Ark. at 73, 146 S.W.3d at 882; *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

Appellant's petition did not provide any facts that would support a showing of prejudice as to trial counsel's failure to seek suppression of the statement in that he failed to show how a motion to suppress the statement could have been successful. Counsel did seek to exclude the statement through a motion *in limine* that was unsuccessful. As the trial court's order denying postconviction relief noted, the court of appeals affirmed the determination that the statement was voluntary and not the result of interrogation or coercion. While appellant asserts that he was interrogated by the police officer concerning the ownership of the vehicle he was driving, he does not assert that this questioning continued up to the time of his statement. The petition did not state any facts that would indicate a motion to suppress would have been successful.

Appellant argues in his brief that a motion to suppress would have been successful because he would have testified that, contrary to the police officer's testimony, the question asked was one directed to appellant, and that appellant did not make the same statement quoted by the witness. He did not include that argument in his petition. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for the first time on appeal. *Dowty v. State*, 363 Ark. 1, ___ S.W.3d ___ (2005); *see also*, *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). As this argument was not presented to the trial court, we do not consider it.

Appellant next argues that counsel was ineffective for failure to object to admission of information concerning certain theft charges. The testimony at trial was that appellant was pulled

over in a traffic stop when a Hot Springs police officer noticed the vehicle he was driving had suspicious tags, and then discovered that the license should have been attached to a different vehicle. The police officer found the methamphetamine in a key fob after arresting appellant because of outstanding warrants already on file. The theft charges were *nolle prossed* before trial. Appellant appears to argue that he was prejudiced by the admission of any evidence that he was suspected of theft and that counsel failed to object to that testimony.

A challenge to the introduction of the information and other evidence showing appellant was initially charged with theft by receiving would not have been successful. The State is entitled to prove a case as conclusively as possible. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003) (citing *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001)). Here, as in *Smith*, the evidence concerning the uncharged offense was central to the prosecution's proof of its case. The facts and circumstances concerning the theft charges were clearly *res gestae* of the possession of methamphetamine, as the trial court found in its order. In fact, appellant's defense centered upon the claim, as made in opening statement, that the car was borrowed and he did not know the drugs were in the key fob.

Trial counsel did raise the issue of providing further instruction to the jury concerning the *nolle pros* of the charges at close of testimony. He referenced an exchange on cross of the police officer in which counsel had attempted to have the officer confirm that the charges were indeed *nolle prossed*. The prosecution argued that the time to bring the charges had not lapsed, and the trial court ruled that, taking into account counsel's question during the exchange, any further instruction would only result in more confusion. We cannot say that appellant has shown deficient performance on this point by trial counsel.

Appellant's last argument concerns the testimony by the State's expert. Appellant raised a

claim in his petition that counsel was ineffective because he failed to challenge the witness's qualifications as an expert. Appellant additionally argues in his brief before this court that counsel was ineffective for failure to investigate whether an independent expert may have provided testimony to contradict the witness's conclusion that the amount of methamphetamine at issue was "usable." Because appellant did not raise that additional argument in his petition, we do not address it, as this is an argument that is once again raised for the first time on appeal.

As to the claim that was raised in his brief, appellant has not shown an argument that trial counsel might have successfully used to challenge the witness's qualifications to testify as an expert. His argument on that issue is limited to conclusory statements that the witness was not qualified to testify concerning what was a usable amount of methamphetamine. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). During cross-examination, counsel did challenge the witness's ability to provide conclusive testimony on the question and offer the jury a reason to limit the weight allocated to the testimony. Counsel also sought and received a ruling from the trial court during closing arguments that the prosecution was to limit its comments so as not to imply that the witness was an expert as to the issue of what would constitute a usable amount. Appellant has provided no additional argument or facts that may have been the foundation for a challenge to the witness's credentials as an expert. We cannot say that appellant made a showing of any error or prejudice on this point.

Appellant failed to present facts in his petition to overcome his burden of proof. An evidentiary hearing should be held in a postconviction proceeding unless the files and the records of the case conclusively show that the prisoner is entitled to no relief. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). The trial court has discretion pursuant to Ark. R. Crim. P. 37.3(a) to decide

whether the files or records of the case are sufficient to sustain the court's findings without a hearing. *Greene*, 356 Ark. at 66, 146 S.W.3d at 877. Here, the record does conclusively show that the petition did not support grounds for relief under Rule 37.1 and appellant was not, therefore, entitled to relief. We hold that the trial court did not abuse its discretion in denying postconviction relief without a hearing.

Affirmed.